
PERSONA Y DERECHO

REVISTA DE FUNDAMENTACIÓN DE LAS INSTITUCIONES JURÍDICAS Y DE DERECHOS HUMANOS

REVISTA SEMESTRAL DE LA FACULTAD DE DERECHO
ÁREA DE FILOSOFÍA DEL DERECHO - INSTITUTO DE DERECHOS HUMANOS
FUNDADA EN 1974
UNIVERSIDAD DE NAVARRA
PAMPLONA. ESPAÑA / ISSN: 0211-4526
2012/1 / NÚMERO 66 (ENERO-JUNIO) / 2012/2 / NÚMERO 67 (JULIO-DICIEMBRE)

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Edita:

Servicio de Publicaciones
de la Universidad de Navarra, S.A.
Campus Universitario
31080 Pamplona (España)
T. 948 425 600

Precios 2011:

Unión Europea:
Suscripción anual: 1 año, 2 vols. / 50 €
Número suelto: 28 €
Otros países:
Suscripción anual: 1 año, 2 vols. / 52 €
Número suelto: 38 €

Maquetación:

pretexto@pretexto.es

Impresión: GraphyCems

Tamaño: 170 x 240 mm

Fecha impresión:
30-diciembre-2012

DL: NA 685-1975
SP ISSN: 0211-4526

PERSONA Y DERECHO

REVISTA DE FUNDAMENTACIÓN DE LAS INSTITUCIONES JURÍDICAS Y DE DERECHOS HUMANOS
2012* / NÚMERO 66 (ENERO-JUNIO)

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ISSN: 0211-4526

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NÚMERO 66
2012 / 1
LOS DERECHOS
SOCIALES

REVISTA SEMESTRAL DE LA FACULTAD DE DERECHO /
SERVICIO DE PUBLICACIONES DE LA UNIVERSIDAD
DE NAVARRA / PAMPLONA / ESPAÑA



Universidad
de Navarra

Constitutionalisation of Social Human Rights – necessity or luxury?

*Constitucionalización de los derechos sociales.
¿Necesidad o lujo?*

RECIBIDO: 2012-01-13 / ACEPTADO: 2012-03-12

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Abstract: In this article will argue that the weak point of constitutional provisions concerning economic, social and cultural freedoms and rights is delegating the competences of detailed regulation in most cases to the ordinary legislator, at the same time failing to determine the guidelines and framework of its legislative activity. Moreover, some of the regulations concerning social rights are defined by the so-called guideline norms determining in a general way the aims and directions of the state's activity in various areas.

Key words: Human Rights, Neoconstitutionalism, fundamental rights, social rights, constitutionalisation

Resumen: En este trabajo se sostendrá que uno de los aspectos más débiles de la constitucionalización de los derechos económicos, sociales y culturales es la fuerte delegación de su regulación concreta en las manos del legislador ordinario, sin que se le proporcione una guía ni un contexto adecuados.

Palabras clave: derechos humanos, neoconstitucionalismo, derechos fundamentales, derechos sociales, constitucionalización.

1. INTRODUCTION

Although controversies surrounding the inclusion of social liberties and rights in the Constitution appeared already at the beginning of the democratic state in the 18th century, they became more intensive during the debates on the new constitutions in the 20th century, since various proposals of the new constitutions of democratic states treated the issue of social rights differently.

For instance, the Swedish Act on the form of government of 1947 does not include any provisions concerning social matters. The constitution of the

German Federal Republic of 1949 includes only the clauses of social state (i.e. a statement that Germany is a social state), while the Polish constitution of 1997 includes a whole subsection devoted to social matters.

As a result from this academic and political debate, although social, cultural and economic rights (with the exception of property rights) are to a varying degree present in individual constitutions of most EU states, no elements common for them all can be determined.

In the states whose constitutions ignore norms concerning social matters the social sphere remains the legislator's domain, which does not mean that it is underestimated in social life. On the contrary, as is the case in Sweden, the principle of social state may be implemented there in an exemplary way.

Some countries subjected social rights to constitutional regulation, simultaneously interpreting them as merely the aims of the state's activity. This prevents them from becoming the basis for claims that there should be provided by the state, which happens to be expressed *expressis verbis* by the norms of some constitutions (e.g. art. 41(1) of the constitution of Switzerland of 1999) and thus becoming the most frequently implemented solution nowadays. In this respect constitutional regulations may differ in their scope; some mention merely several social aims (rights) (e.g. art. 69, 70 of the constitution of Iceland of 1944; § 100 and 110b of the constitution of Norway of 1814 in the version of 1992), while others offer a wider perspective of the matter (e.g. the constitution of Switzerland of 1999).

The third possible solution is a constitutional regulation of social rights treated not only as the aims of the state's activity but also as the rights which may be asserted in the process of law. This solution is implemented in the states whose constitutions were revised in the second half of the 20th century (e.g. the constitution of Poland of 1997, the constitution of Portugal of 1976 in the version of 1997, the constitution of Brazil of 1988). They were desirable from the point of view of the society and satisfied its expectations. In practice, however, their implementation encountered serious problems, while the constitutional regulation itself is increasingly more severely criticised, e.g. in Brazil and the countries of the Iberian Peninsula.

Both the discussions and the fact of diversity justify the continuing interest in determining the nature, extent and grounds of social rights formalized in constitutional texts. In what follows we will describe the main streams of

opinion concerning these issues in the German constitutional literature from the 1970's and 80's, with the final object of establishing their impact in the Polish Constitutional Text approved in 1997.

2. THE NATURE AND PURPOSE OF SOCIAL RIGHTS

The purpose of many of contemporary states, in contrast to the liberal state, is to direct the processes of social development and to ensure impartial distribution of its fruits. In order to achieve its goals, it may apply not only the traditional means (i.e. commands and prohibitions) but also a wide spectrum of other measures designed to direct one's personal conduct (e.g. through taxation or subsidies).

The state and society are not treated as mutually opposing forces, although they are not identical with each other. The social state ruled by law is separated from society, which guarantees freedom of the individual, but is also closely connected with it, thereby guaranteeing progress and social justice.

This corresponds with the departure from regarding an individual as an isolated subject whose links with society are recognized. On the one hand, this makes it possible to emphasize individual responsibility for deciding the fate of the community and leads to re-evaluation of duties consigned to him/her, which, having received a wider social context, become instruments for implementing new tasks of the state.

On the other hand, the state has been obliged to care for the subsistence of an individual and ensure the provision of opportunities for an individual development as guaranteed in the constitution. This leads to a change in the character of individual rights that begin to function as an aim of the state's activities. Formal guarantees do not suffice, and the state is compelled to undertake political, environmental, social and other activities in order to carry out the programme formulated in provisions of the constitution relating to them. Rights and freedoms do not protect only the individual sphere of liberty of the person, but also play some social functions and, therefore, an enjoyment thereof should be socially oriented, i.e. when protecting interests of an individual they also serve the common good.

An example in question may be constituted by the judicial decisions of the German Federal Constitutional Tribunal, which decided that they also have an objective character and contain elements decisive for the existence

of a system of values essential for the society and directly independent of an individual¹. The concept was elaborated on as follows: “it is correct that the Constitution, which is not a neutral act in terms of its contents, introduced an objective system of values in the part concerning fundamental rights and thus highlighted the significance of fundamental rights. [...] This system of values, whose central elements are an unrestricted development of personality and human dignity, must [...] affect all areas of law, while it inspires and sets the guidelines for legislation, administration and the system of justice”².

The concept of human rights and liberties typical of the so-called social state ruled by law underlines political rights of citizens. They play an important role in the functioning of the democratic state. They not only stimulate democratic modifications of political institutions, but allow the growth of sense of law in society as well. They influence a wider range of realization of other rights and freedoms.

Confirming the significance of social rights, the social state ruled by law treats them in a different way from political or personal rights. They do not found any claims by an individual for a particular behaviour on the part of the state or any concrete performance, but are rather an imposition on the state of an obligation to undertake activity for their accomplishment.

For instance, in the early 1970s the German Federal Constitutional Tribunal recognized the social function of fundamental rights enabling an individual to benefit from or participate in (the German term *Teilhabe* lends itself to both interpretations) the benefits provided by the state and simultaneously interpreted them as the source of the state’s or legislator’s responsibility for “compensating for social inequalities” and “just social order”³. In justifying one of its decisions (concerning access to university education) it stated that: “the more a modern state emphasises the need to provide a citizen with social security and an opportunity for cultural development, the more it is obliged to ensure that apart from guaranteeing a certain sphere free from state intervention, fundamental rights constitute the means of participating in the benefits provided by the state”⁴.

¹ Cfr. e.g. BverfGE 2, pp. 21 ff.

² BverfGE 7, p. 202. Cfr. also BverfGE 39, p. 41.

³ BverfGE 22, pp. 180 ff.

⁴ BverfGE 33, pp. 330-331

The social state ruled by law, as compared to the liberal state, reverses the principles concerning the substantial scope of rights, freedoms and duties contained in the constitution. While under the liberal conception they relate, above all, to citizens, and only in exceptional situations to non-citizens, under the concept of the social state ruled by law, it is assumed that provisions of the constitution specifying the status of an individual are addressed to all persons staying in the territory of a given state, except for the rights, freedoms and duties explicitly reserved for citizens.

This is exemplified by the judicial decisions of the Swiss Federal Tribunal concerning art. 56 of the no longer binding constitution of Switzerland of 1874. Its orthodox interpretation may result in the conclusion that solely the citizens are entitled to freedom of assembly and right to association. However, the judicial decisions of the Federal Tribunal and common courts of law tend to extend the scope of freedom of assembly and right to association to include non-citizens, while admitting that in their case greater restrictions in exercising these rights may apply than in the case of citizens⁵. This view was supported by art. 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ratified by Switzerland, which interprets freedom of assembly and right to association as the rights to which “everyone” is entitled, independently of his or her citizenship.

3. THE CONTROVERSY OVER THE CONVENIENCE OF RECOGNIZING CONSTITUTIONAL SOCIAL RIGHTS.

The comparison of the catalogue of constitutional human rights common for all the EU member states shows that its core is formed by traditional (classic) personal liberties and political rights. Social, cultural and economic rights (with the exception of property rights) are to a varying degree present in individual constitutions and in their case no elements common for them all can be determined.

⁵ More on the subject cfr. ARTA, H. R., *Die Vereins, Versammlungs und Meinungsäusserungsfreiheit der Ausländer*, St. Gallen 1983, pp. 66-70.

This is caused by the controversy in the science of law and among various political movements concerning the need of and extent of constitutional regulation of social rights and the whole social sphere.

Opponents of subjecting social rights to constitutional regulation maintain that since the degree of their implementation always depends on current and constantly changing economic situation, the matter should thus be subject to statutory legislation. In their view the regulation's place in the legal hierarchy should not determine the extent of social effects of state's effort. They also emphasise that social rights have a postulatory character. In their case a state must first elaborate and then implement complete social programmes⁶. If, apart from the norms of postulatory character, the constitution included social rights enabling an individual to claim benefits from the state, to meet these it might have to take over the control of economy, which would contradict the provisions of property rights and economic freedom⁷.

In this context it is the essence of the constitution that is important, the role it is to play in the state. This is referred to by W. Martens, who writes: "Where [...] the guarantee of freedom is interpreted as the guarantee of existence, a constitution devoted to the principle of liberty contradicts itself"⁸.

From this perspective including social rights in the constitution is prevented by fear of undermining the effectiveness of political rights and civil liberties in a situation where the same catalogue would protect an individual against the state and would simultaneously authorize him or her to demand benefits from it. Because of this "the constitution [...] is transformed from the act which determines the limits of authority into the act which determines the sphere of the authority's obligations. Consequently, this transforms the constitution into a peculiar charter of social life"⁹. Additionally, the state is not obliged to guarantee social rights and to provide actual conditions enabling individuals and social groups to benefit from their constitutionally guaranteed

⁶ Cfr. MÜLLER, J. P., *Soziale Grundrechte in der Verfassung?*, Basel-Frankfurt am Main, 1981, pp. 41-44, 203.

⁷ Cfr. HORNER, F., *Die sozialen Grundrechte*, Salzburg, München 1974, p. 225.

⁸ MARTENS, W. y HÄBERLE, P., "Grundrechte im Leistungsstaat", *Veröffentlichungen der Vereinigung des Deutschen Staatsrechtslehrer*, z. 30 (1972), p. 33.

⁹ CIEMIŃSKI, J., *Konstytucja państwa socjalnego czy konstytucja państwa liberalnego?*, w: *Prawo w okresie przemian ustrojowych w Polsce. Z badań Instytutu Nauk Prawnych PAN*, Warszawa 1995, pp. 68-69.

rights. This aims at preventing the use of other rights included in the constitution to satisfy social claims.

The viewpoint that social rights should not be included in a constitution has had many proponents in the German doctrine of constitutional and European law from the 1970's and 1980's. It is held that such rights have a programmatic nature and that in this respect the state must implement whole social programmes. Personal and political rights and freedoms require that the state and EU creates adequate institutional guarantees or only refrains from interfering with the legally protected autonomy of the individual. They may be accomplished more easily and quickly, and EU or state activity is in this respect determined to a smaller degree by economic factors.

W. Martens writes: “Where [...] guarantees of freedom are interpreted as the guarantees of existence, a libertarian constitution contradicts itself”¹⁰. In this view, the argument against including social rights in the constitution is rooted in the fear of weakening the effectiveness of political rights and personal freedoms in the situation when the same catalogue would protect an individual against the activity of the state and at the same time authorise him or her to take advantage of the benefits which it provides. In such a case “a constitution [...] is transformed from the act restricting the limits of authority into an act which determines the sphere of its duties. As a result a constitution is transformed into a charter of social life”¹¹. Moreover, a state is neither obliged to guarantee certain social rights nor to provide actual conditions enabling individuals or social groups to exercise their constitutionally guaranteed rights, which is to prevent exercising other rights included in the constitution for the purpose of claiming social benefits.

On the other hand, proponents of regulation of social rights in EU law advocate the need of departing from the treatment of fundamental rights and liberties as the means of merely protecting individuals against the interference on the part of the state. The guarantee of civil liberties and political rights thus requires taking into account economic, social and cultural conditions, i.e. introducing social rights into the constitution. According to P. Häberle, in the contemporary state “a complex tool develops, which includes the following elements: guarantee of fundamental rights as widely-understood social rights,

¹⁰ MARTENS, W. y HÄBERLE, P., “Grundrechte...”, *op. cit.*, p. 33.

¹¹ CIEMIŃSKI, J., *Konstytucja...*, *op. cit.*, pp. 68-69.

as the aim of the constitution, as the subjective entitlement to benefits and as the interpretation guidelines for the judiciary”¹². He also notes that:

“absence of or modest presentation of social matter in the constitution does not prevent the state from the possibility of conducting broad social policy transforming it into a welfare state. Presence of precise and elaborate social matter in the constitution determines this direction. Therefore, from the point of view of the majority of citizens who will benefit from social rights [...] it is desirable that [...] the constitution includes elaborate and precise regulations of the social matter”¹³.

4. THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS AND ITS ROLE CONCERNING SOCIAL RIGHTS

For the proponents of social rights in the states lacking constitutional regulation of the matter or where this regulation is limited, the Charter of Fundamental Rights has a great significance for two reasons. Firstly, the Charter includes the statements distinctly indicating the existence of social rights, thanks to which they, interpreted as fundamental, would be indirectly introduced into the legal systems of these states. Secondly, the charter enables to grant a social function to the rights already included in the constitution which are not treated as social. Then “classic fundamental civic rights are mixed with fundamental social rights which may be appealed from as being directly applicable and as subjective constitutional law”¹⁴. Pursuant to these citizens could demand the state to provide certain benefits, both of material character and as means enabling them to take advantage of the regulations created by the state aiming at providing social conditions for their implementation.

Deciding to include the group of social rights and freedoms in the constitution, its authors sometimes attempt to meet emerging aspirations of the public, but were at the same time aware of the limited financial capabilities of the State.

¹² MARTENS, W. y HÄBERLE, P., “Grundrechte...”, *op. cit.*, p. 73.

¹³ ZAWADZKA, B., *Prawa ekonomiczne, socjalne i kulturalne*, Warszawa 1996, p. 94.

¹⁴ MÜLLER, J. P., “Katalog i zakres obowiązywania praw podstawowych”, en Z. CZESZEJKO-SOCHACKI (ed.), *Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 r. i Konstytucja Rzeczypospolitej Polskiej z 1997 r.*, Białystok 2001, p. 78.

Spain and Portugal may constitute an example here. “Critical attitude towards the solutions adopted by both constitutions results from the negative appraisal of fundamental provisions adopted due to the constitutions’ normative requirements, which is rooted in economic and social realities of both countries. Neither of them managed to implement the adopted aims, and thus their constitutional provisions remain a dead letter, though admittedly to varying degrees”¹⁵.

Exemplification of it is Article 81 of the Polish Constitution. It distinguishes two categories of economic, social and cultural freedoms and rights depending on the criterion of protection:

1) The rights and freedoms that may be exercised directly on the basis of constitutional norms, i.e. those in respect of which the content of their guarantees has a real character, including a judicial protection. However, even in order to determine their scope the constitution often assigns a decisive role to statutes extending its provisions (e.g. Article 67). Such type of rights and freedoms include: the right to ownership, other property rights and the right of succession; the freedom to choose and to pursue one’s profession and to choose one’s place of work; the right to social security whoever incapacitated for work or without work; the right to have one’s health protected; the right to education; the right of the child to be protected and the right to care and assistance provided by public authorities; the freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and enjoy the products of culture.

2) The rights and freedoms that may be asserted exclusively within the limits specified by statute. They include all remaining economic, social and cultural rights and freedoms. Provisions of the constitution relating to them often impose on public authorities an obligation to pursue a specified policy, such as, e.g. Article 75(1), which states that: “Public authorities shall pursue policies conducive to satisfying the housing needs of citizens...”. Such formulation makes it possible to vindicate exercise of that category of rights not only by individuals, but also collectively by organized groups of citizens applying means of political action (e.g. a motion of no confidence in the government, submitted by Deputies representing one of the political parties).

A separate problem is the possibility to enforce social rights and related to them obligations of the authorities using legal means, including the consti-

¹⁵ ŁABNO-JABŁOŃSKA, A., *Iberyjska...*, *op. cit.*, p. 131.

tutional complaint. Despite the voices treating the prevention of the judiciary way, including the constitutional complaint, as an “expression of legal hypocrisy” causing that “some laws are not laws”². The Constitutional Commission of the National Assembly eventually accepted Art. 81 of the new constitution that is located at the end of the sub-chapter titled “The means of protection of freedoms and liberties” saying that the social rights cannot be enforced using the constitutional complaint but they can be enforced within the limits specified in an Act. That means that such laws may be enforced in courts provided a relevant Act makes it possible. However, one cannot enforce in courts the obligations of public authorities.

The economic, social and cultural liberties and rights are divided into two groups:

- that can be enjoyed by every person within the territory of the Republic of Poland: the freedom of ownership, other property rights and the right to inheritance; the freedom of choice and performance of a job and selection of the place of work; the right to safe and hygienic conditions of one’s work; the right to rest¹⁶, the right to the protection of one’s health; the right of disabled people to an assistance provided by public authorities in assuring their livelihood, job training and transportation; the right to education; the right of the families to protection; the right of mothers to special assistance from the public authorities; the right of children to a security and the right to a care and assistance from the public authorities; The freedom of artistic creation, scientific research and publication of their results, the freedom of teaching; the freedom to use the cultural goods; the right to a protection of the environment and to actions aiming at it and the right to information on the state and protection of the environment; the right of tenants to a protection of their rights; the right of consumers, users and lessees to a protection against the action threatening their health, privacy and security as well as against dishonest market practices,
- that can be enjoyed only by the citizens of the republic of Poland: the right to social security in the event of one’s inability to work and

¹⁶ The Constitution, in Art. 66 (2), establishes the right of every employee to the days free of work and annual, paid holidays specified in an act. Also an act specifies the norms concerning the time of work (42 hours a week).

in event of remaining unemployed¹⁷; an equal access to the publicly funded health care services¹⁸; the right to found the schools of all levels; an equal access to education.

5. CONCLUSION

Hence, the Polish constitution corresponds with a trend observed in many democratic countries.

Proponents of subjecting the sphere of social rights to constitutional regulation quoted the results of opinion polls proving unambiguous social preferences of the decisive majority of the society. They emphasised that “modest regulation or even absence of social matters in the state’s constitution does not prevent it from conducting generous social policy, thus transforming it into a social state; however, presence of precise and extended social matter in the constitution predetermines this line of development. Therefore, from the point of view of the majority of citizens, who are beneficiaries of social rights [...], it is desirable that the new constitution of Poland includes extended and precise regulations of the social matter”¹⁹.

The weak point of constitutional provisions concerning economic, social and cultural freedoms and rights is delegating the competences of detailed regulation in most cases to the ordinary legislator, at the same time failing to determine the guidelines and framework of its legislative activity. Moreover, some of the regulations concerning social rights are defined by the so-called guideline norms determining in a general way the aims and directions of the state’s activity in various areas. There are views which differentiate legal significance of individual constitutional provisions and attribute normative char-

¹⁷ Each citizen is entitled to it in the event of inability to work because of sickness, disability or reaching the retirement age. Moreover, the right to social security that have all Polish citizens who are unemployed unwillingly and who don’t have other means to support themselves.

¹⁸ Each person within the territory of the Republic of Poland has the right to the health protection. But only citizens are entitled, regardless of their financial situation, to an equal access to the publicly funded health services (Art. 68 of the Constitution). The public authorities are also obliged to fight epidemics and prevent the degradation of the environment that would have a negative impact on the human health. They should also support the development of physical culture and provide special care for children, pregnant women, elderly and disabled persons.

¹⁹ Cfr. B. ZAWADZKA, *Prawa ekonomiczne, socjalne i kulturalne*, Warszawa 1996, p. 94.

acter only to those which lend themselves to interpretation resulting in concrete obligations for the subjects implementing the constitution²⁰. Absence of this feature is decisive for depriving them of their normative character, which most frequently is the case of the guideline provisions characteristic for social rights.

In the case of social rights abstaining from the activity aiming at implementing general assumptions constitutes a criterion for appraising the activity of the state, which has to be evaluated in terms of:

- 1) legislative activity undertaken by the bodies of legislative power (initiating rational legislative procedures concluded with adopting relevant legal acts);
- 2) concrete and appropriate activity undertaken by the bodies of executive power – both centrally (issuing ordinances) and locally (undertaking activity in concrete cases);
- 3) activity of local self-government.

It should be emphasised here that the activity of the state thus determined is not to serve the purpose of preventing actual situations (e.g. unemployment). It is primarily to constitute the grounds for citizens to take initiative by citizens, while the existence of certain social mechanisms and institutions has a character of immediate and temporary aid, i.e. security of existence understood as a provision of certain minimum material conditions accompanied by creating the possibility (and imposing the duty – due to the temporary character of material help) of assuming responsibility for an independent life.

²⁰ More on the subject c.f. A. KUBIAK, *O interpretacji przepisów programowych Konstytucji*, PiP 1987, vol. 4, p. 20 ff.; T. GIZBERT-STUDNICKI, A. GRABOWSKI, *Normy programowe w konstytucji*, [in:] J. TRZCIŃSKI (ed.), *Charakter i struktura norm konstytucyjnych*, Warszawa 1997, pp. 104-105.